Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-911 and 78-1036

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Respondents.

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

OPPOSITION OF RESPONDENT MANUFACTURING CHEMISTS ASSOCIATION

EDMUND B. FROST
BRUCE M. BARACKMAN
1825 Connecticut Avenue, N.W.
Washington, D.C. 20009

Counsel for Respondent
Manufacturing Chemists Association

INDEX

	Page
OPINION BELOW AND JURISDICTION	2
COUNTERSTATEMENT OF QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
COUNTERSTATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRITS	8
A. The Decision Below Is Not in Conflict with the Decisions of Other Circuits and Is Plainly Correct	8
B. The Decision of the Court Below Does Not Place an Impossible Burden on the Secretary	11
C. The Decision Will Not Interfere with the Administration of the Act	13
D. Clarification of the Occupational Safety and Health Act Will Come from Other Courts of Appeal	14
CONCLUSION	15

CITATIONS

Cases: Page

American Iron and Steel Institute v. *OSHA*, 577 F.2d 825 (3d Cir. 1978), *petitions for cert. pending*, Nos. 78-918 and 78-919 8

Industrial Union Department, AFL-CIO v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974) 8

Society of the Plastics Industry v. *OSHA*, 509 F.2d 1301 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975) 8

Turner Company v. *Secretary of Labor*, 561 F.2d 82 (7th Cir. 1977) 9

Statutes:

Occupational Safety and Health Act of 1970:

29 U.S.C. § 651 11
29 U.S.C. § 652(8) 2, 3, 6, 8, 9
29 U.S.C. § 655(a) 3
29 U.S.C. § 655(b)(5) 2, 8, 9
29 U.S.C. § 655(c) 4
29 U.S.C. § 655(f) 2, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-911 and 78-1036

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Respondents.

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

OPPOSITION OF RESPONDENT MANUFACTURING CHEMISTS ASSOCIATION

Respondent Manufacturing Chemists Association ("MCA") submits this opposition to the Petitions for

Writs of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case which have been filed by the Industrial Union Department, AFL-CIO ("IUD") and by the Solicitor General on behalf of the Secretary of Labor ("the Secretary") on December 7 and December 26, 1978, Nos. 78-911 and 78-1036, respectively.

OPINION BELOW AND JURISDICTION

The opinion below and the jurisdiction of this Court are set forth in the Petitions of the IUD and of the Secretary and will not be repeated here.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a revised occupational health and safety standard for a toxic substance promulgated by the Secretary satisfies the statutory requirement that it be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" in the absence of substantial evidence in the record taken as a whole showing the extent to which employee safety or health will be enhanced thereby.

2. Whether the Secretary, in promulgating a revised occupational safety and health standard which is required to be based on the "best available evidence, . . . research, demonstrations, experiments" and "the latest available scientific data in the field" may rely on dated, inconclusive data when modern techniques are available to provide definitive answers.

STATUTE INVOLVED

The pertinent sections of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(8), 655(b)(5) and 655(f), are set forth in the Petitions of IUD and of the Secretary and will not be repeated here.

COUNTERSTATEMENT OF THE CASE

1. The Occupational Safety and Health Act of 1970 ("the Act") authorizes the Secretary to promulgate mandatory occupational safety and health standards which are defined in 29 U.S.C. § 652(8) as meaning requirements that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." In connection with occupational exposure to benzene,[1] three such standards have been promulgated.

In 1971, pursuant to 29 U.S.C. § 655(a), the Secretary[2] adopted the national consensus standard which imposed a permissible exposure limit ("PEL") of 10 parts of benzene per million parts of air (ppm) as an eight-hour time weighted average (TWA), an acceptable ceiling concentration of 25 ppm and an excursion level above the ceiling of a maximum of 50 ppm for not more than 10 minutes in any eight-hour work period. (App. 71a).[3] That standard is the standard presently in effect.

In 1974, the National Institute of Occupational Safety and Health (NIOSH) submitted a criteria document which noted a possible connection between benzene ex-

---

[1] Benzene is "a ubiquitous hydrocarbon compound" (App. 5a). It is derived chiefly from the petroleum cracking process, although a small amount (6%) is produced as a by-product of coke ovens. In 1976, more than 11 billion pounds were produced, making benzene the second largest hydrocarbon product and the twelfth most widely produced chemical. It is a basic chemical feed stock and is used in the manufacture of other organic chemicals. It is also used in the printing, lithographic, stain remover, adhesive, rubber cement, rubber fabricating, paint, varnish, pesticides and detergent industries. It is a component of motor fuels including gasoline. (App. 69a-70a). Its presence in motor fuels acts as an octane booster.

[2] References herein to the Secretary include the Occupational Safety and Health Administration ("OSHA") which acted under the Secretary's responsibility.

[3] This and similar references are to the Appendix to the IUD Petition.

posure and leukemia, but recommended that the existing standard be essentially maintained. (App. 71a-72a). In 1976, NIOSH issued a revised criteria document concluding that benzene was a leukemogen and recommending an exposure level of 1 ppm or less. NIOSH also recommended the issuance of an emergency temporary standard (ETS) under 29 U.S.C. § 655(c). The Secretary declined to promulgate an ETS, but instead issued in January, 1977 voluntary guidelines recommending a 1 ppm 8-hour TWA level. (App. 73a).

On April 15, 1977, NIOSH transmitted to the Secretary the results of an epidemiological study (the so-called Infante Study) conducted at two plants in Ohio at which benzene had been used in the manufacture of a product known as Pliofilm. The period covered by the study was 1940 to and including 1949. NIOSH again recommended the issuance of an ETS. (App. 73a).

On May 3, 1977, the Secretary, relying on the Infante Study which purported to show an increased incidence of leukemia at exposures of "0 to 10 to 15 parts per million,"[4] issued an ETS reducing the exposure limit to 1 ppm. That ETS was stayed by the Fifth Circuit and never went into effect.

In February, 1978, after notice and hearing, OSHA promulgated its Permanent Standard for Occupational Exposure to Benzene, reducing the exposure level to 1 ppm for an 8-hour TWA and to a 5 ppm ceiling for any exposure for 15 minutes. In addition, the Permanent Standard prohibited dermal and eye exposure to liquid

[4] The Secretary later admitted that evidence at the hearing demonstrated "that there were area exposures during this study period exceeding these levels, at times reaching hundreds of parts per million," and that no "conclusions linking the excess leukemia risk . . . with any specific exposure level" could be derived from the Infante Study. (App. 105a).

mixtures containing benzene,[5] and required employers to conduct monitoring of exposure levels, to engage in detailed medical testing and surveillance of employees exposed to benzene, and to keep both exposure and medical records. The Permanent Standard was also stayed by the Fifth Circuit and has never become effective.

The Permanent Standard was accompanied by a lengthy preamble which recapitulated the scientific literature concerning the toxicity and alleged leukemogenicity of benzene. With regard to the leukemogenicity of benzene, the Secretary relied on a number of epidemiological studies for his conclusion that exposure to benzene had caused leukemia in workers. Each of those studies, however, either involved exposure levels considerably in excess of 100 ppm or exposure at unstated levels. For example, the study by Aksoy *et al.* of Turkish shoemakers showed exposure levels of 150-210 ppm. (App. 101a).[6] The Secretary was unable to produce any evidence of leukemia in workers exposed to levels of 10 ppm. He rejected, however, several industry studies which showed no excess incidence of leukemia at the current level of 10 ppm. And he concluded that since benzene was a leukemogen at some high exposure level, it

[5] As originally promulgated, the Permanent Standard prohibited dermal or eye contact with liquid mixtures containing *any amount of benzene*. After receipt of petitions for reconsideration asserting the impossibility of such a standard, the Secretary reopened the record and, on June 21, 1978 (the day before the argument in the Fifth Circuit), revised the standard so as to exempt liquid mixtures containing 0.5% benzene by liquid volume (0.1% after three years) and the labeling of such mixtures containing 5.0% or less benzene by liquid volume if such mixtures were in inventory before June 27, 1978. (App. 252a).

[6] As noted above, the NIOSH study of April 1977 (the Infante Study) upon which the Secretary relied in promulgating the ETS involved exposures of several hundred ppm rather than 10 ppm or less as the Secretary had erroneously believed.

was a leukemogen at any level and that any exposure must be considered to be attended by risk.[7]

Even though industry and the Council on Wage and Price Stability provided him with appropriate methods (App. 160a-161a) the Secretary declined to measure the extent of the benefit to employees which might be obtained by lowering the exposure level from 10 ppm to 1 ppm. Instead, he contented himself with the assertion that the number of cancers to be prevented "may be appreciable". (App. 160a).[8] This refusal to measure the benefits to be derived was based on the Secretary's interpretation of the Act which was to the effect that the Congress had "already arrived at a judgment concerning balancing cost and benefit" (App. 159a) and that OSHA was not permitted to "substitute cost benefit criteria for the legislatively determined directive of protecting all exposed employees against material impairment of health or bodily function." (App. 162a).

2. The court below set aside the Permanent Standard because it concluded that the Secretary had failed to show that the Standard met the statutory definition of section 3(8) of the Act as being "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." In reaching that conclusion,

[7] As the court below noted (App. 13a, n.20), the Secretary reached this conclusion despite "the fact that all studies associating benzene and leukemia involve high benzene concentration levels, that a substantial body of the scientific community subscribes to the theory that safe threshold levels exist for exposure to carcinogens, and that empirical evidence shows that low-level exposure to benzene does not cause leukemia."

[8] The court below acknowledged that the Secretary's assumption that some benefit was likely "is not unsupported," but went on to emphasize that the "lack of substantial evidence of discernible benefits is highlighted when one considers that OSHA is unable to point to any empirical evidence documenting a leukemia risk at 10 ppm even though that has been the permissible exposure limit since 1971." (App. 18a).

the court rejected as overbroad the Secretary's interpretation of the Act. The court noted that Congress had not intended to give the Secretary "unbridled discretion to adopt standards designed to create absolutely risk-free work places regardless of cost." Instead, Congress imposed various "pragmatic limitations" on the Secretary's authority, including requirements that standards be "appropriate and necessary" and "feasible." (App. 15a-16a). Accordingly, the court read the Act as requiring the Secretary to make "rough but educated estimates of the extent of the benefits expected from reducing the permissible exposure level from 10 ppm to 1 ppm." (App. 21a). The court emphasized the limited and reasonable nature of its holding, stating that it was not requiring that the Secretary "wait until deaths occur" but only that OSHA should "have some factual basis for an estimate of expected benefits before it can determine that a one-half billion dollar standard is reasonably necessary." (App. 20a). The court concluded:

> "OSHA's failure to provide an estimate of expected benefits for reducing the permissible exposure limit, supported by substantial evidence, makes it impossible to assess the reasonableness of the relationship between expected costs and benefits. This failure means that the required support is lacking to show reasonable necessity for the standard promulgated. Consequently, the reduction of the permissible exposure limit from 10 ppm to 1 ppm and all other parts of the standard geared to the 1 ppm level must be set aside." (App. 21a-22a).

The court of appeals also set aside that part of the Standard dealing with dermal exposure. In doing so, it concluded that the requirement of the Act that standards be based on the "best available evidence" and "the latest available scientific data in the field" was not satisfied by dated and inconclusive data when modern techniques

are readily available to provide accurate information. (App. 26a-27a).[9]

REASONS FOR DENYING THE WRITS

Both the IUD and the Secretary contend that this Court should review the decision of the court of appeals because (1) it is in conflict with the decisions of other circuits which have dealt with OSHA standards; (2) it imposes on OSHA burdens which OSHA cannot carry; and (3) it has cast considerable doubt on OSHA's past and continuing administration of the Act. MCA respectfully disagrees with these contentions.

A. The Decision Below Is Not in Conflict with the Decisions of Other Circuits and Is Plainly Correct.

Petitioners assert that the decision below is in conflict with the decisions in *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974); *Society of the Plastics Industry* v. *OSHA*, 509 F.2d 1301 (2d Cir. 1975), *cert. denied*, 421 U.S. 992 (1975); and *American Iron and Steel Institute* v. *OSHA*, 577 F.2d 825 (3d Cir. 1978) (petitions for *certiorari* pending in Nos. 78-918 and 78-919). MCA submits that the factual records and the issues decided in those cases are not the same and that the decisions are therefore not in conflict.

The court below applies the Act as a whole rather than in the selective, piecemeal fashion which the Secretary prefers. It did not restrict itself to the application of the section dealing with criteria for standards (29 U.S.C. § 655(b)(5)). Rather, it started with the basic question of the definition of an occupational safety and health standard which Congress put in Section 3(8) of the Act (29 U.S.C. § 652(8)). It concluded that:

[9] The question of dermal exposure is discussed in detail in the opposition filed by The Rubber Manufacturers Association, *et al.*

> "The Act imposes on OSHA the obligation to enact only standards that are reasonably necessary or appropriate to provide safe or healthful workplaces. If a standard does not fit in this definition, it is not a standard which OSHA is authorized to enact." (App. 15a).

From that elementary analytical starting point, the court went on to say that the reasonableness of a standard could only be tested by comparing the reasonableness of the relationship of the benefits which the standard would confer with the costs which the standard would impose. It found further support for that view from the "feasible" and other "pragmatic limitations" embodied in 29 U.S.C. § 655(b)(5). (App. 16a). The court also noted that the judicial review provision (29 U.S.C. § 655(f)) calls for upholding the Secretary if his determinations are "supported by substantial evidence in the record considered as a whole." (App. 4a). However, the court found no substantial evidence to support the Secretary's bare assertion that the benefits "may be appreciable." It therefore could not assess the reasonableness of the relationship between benefits and costs. Accordingly, it concluded that the Secretary had failed to show "reasonable necessity for the standard promulgated." (App. 21a).

While the court below is the first to have been specifically asked to consider the effect of the definition of a standard contained in 29 U.S.C. § 652(8) on the content of a particular standard, it is not the only circuit to have required that benefits be measured in relation to costs. In *Turner Company* v. *Secretary of Labor*, 561 F.2d 82 (1977), the Seventh Circuit set aside a decision of the Occupational Safety and Health Review Commission which involved enforcement of a standard dealing with noise. On the question of the feasibility of engineering and administration controls, the court adopted

the approach of the Commission in a companion case which had held:

> "[Controls] will not be required without regard to the costs which must be incurred and the benefits they will achieve. In determining whether controls are economically feasible, all the relevant cost and benefit factors must be weighed." (561 F.2d at 85).

The Seventh Circuit went on to conclude:

> "[T]he Commission must realistically consider the hazards presented by the excessive noise in Turner's Waterbury room and determine whether the health benefits to employees who are already equipped with personal protection equipment justify the $30,000 cost to Turner for engineering controls." (561 F.2d at 86).

The decisions of the District of Columbia, Second, and Third Circuits are not in conflict with the analysis of the Fifth and Seventh Circuits. They were based on different factual records. And the three courts of appeals involved were never presented with, and hence did not decide, the legal argument that some form of comparative cost-benefit measurement was necessary to the determination of the question whether the standards before them were reasonably necessary or appropriate to provide healthful workplaces.

Moreover, the court below was plainly correct in holding that some showing of benefit in relation to cost is necessary. The Secretary essentially so concedes when he states that the statute "does not preclude all consideration of cost-benefit assessments in the process of setting health standards for toxic substances." (Petition, n.10 at pp. 17-18). The distinction the Secretary then attempts to draw—that he is free to consider costs versus benefits in deciding whether to issue a new standard but not in deciding what the requirements of that standard should be—carries its own refutation. It is the

Secretary who advocates an impermissible reading of the statute—a reading which would require the lowest level of exposure which is technologically obtainable, without regard to the amount of benefits which that would obtain and without considering whether finite resources could be more sensibly employed elsewhere. Congress did not intend any such unbalanced approach when it enacted the statute for the purpose of assuring "*so far as possible* every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. § 651, emphasis added) and put on the Secretary the pragmatic limitations that standards be "reasonably necessary or appropriate" and "feasible." [10]

B. The Decision of the Court Below Does Not Place an Impossible Burden on the Secretary.

Petitioners are incorrect when they assert that the requirement that the Secretary engage in a cost-benefit analysis places an impossible burden on him. For example, the Secretary contends:

> "According to the court, the Secretary must demonstrate measurable benefits to be achieved by reductions in exposure to cancer-causing substances. If the relationship between exposure and disease is imperfectly known, so that benefits cannot be measured, then the Secretary cannot order a reduction in exposure. (Petition, pp. 12-13).

---

[10] The case for denying review of the second question—which involves the dermal and eye contact provisions of the Standard—is even stronger. The petitions do not claim that there is any conflict on this point or that the decision on this point below prevents the Secretary from performing his functions. Also, the correctness of the holding below on this point is apparent from the discussion in the opinion (App. 22a-27a). The reasons why review of this point should be denied are elaborated in the opposition filed by respondents The Rubber Manufacturers Association, Inc., *et al.*

". . . the court, by deciding the case with the reasoning it employed, has crippled the Secretary's ability to deal with substances that cause cancer." (Petition, p. 16 n.9).

The IUD goes even further in asserting that the Secretary must wait until he can quantify the number of lives that would be saved (Petition, p. 2).

MCA respectfully submits that assertions of that kind are an exaggeration of what the court below requires of the Secretary. In fact, the court said as follows:

> "This does not mean that OSHA must wait until deaths occur as a result of exposure at levels below 10 ppm before it may validly promulgate a standard reducing the permissible exposure limit. *See Florida Peach Growers Association, Inc.* v. *United States Department of Labor*, 489 F.2d 120, 132 (5th Cir. 1974). Nevertheless, OSHA must have some factual basis for an estimate of expected benefits before it can determine that a one-half billion dollar standard is reasonably necessary. For example, when studies of the effects of human exposure to benzene at higher concentration levels in the past are sufficient to enable a dose-response curve to be charted that can reasonably be projected to the lower exposure levels, or when studies of the effects of animal exposure to benzene are sufficient to make projections of the risks involved with exposure at low levels, then OSHA will be able to make rough but educated estimates of the extent of benefits expected from reducing the permissible exposure level from 10 ppm to 1 ppm. Until such estimates are possible, OSHA does not have sufficient information to determine that a standard such as the one under review which it can only say might protect some worker from a leukemia risk is reasonably necessary." (App. 20a-21a) (footnotes omitted).[11]

[11] The above quotation serves to correct the incomplete quotation appearing in note 7 at page 10 of the Secretary's Petition.

Thus, the court of appeals is not asking the impossible of the Secretary. Nor is it instructing him to experiment with human life. It merely requires him to "make rough but educated estimates of the extent of benefits expected," based on some substantial evidence which may be derived, for example, from supportable dose-response curve projections from historical data or from animal experiments. The burden imposed on the Secretary is one of working—he is "to regulate on the basis of more knowledge and fewer assumptions than the record reflects" (App. 21a).

C. The Decision Will Not Interfere with the Administration of the Act.

As noted above, the Secretary contends that the decision of the court of appeals has "crippled [his] ability to deal with substances that cause cancer." That again is an exaggeration. Insofar as benzene is concerned, all the Secretary has to do is to reopen the proceedings and develop the rough but educated estimate of the benefits in order that they may be compared to the costs. Whether such a comparison would establish that the standard is reasonable or necessary may, of course, be a matter of controversy. But these kinds of estimates can be made. As the court below noted, the Secretary's own cost expert, Arthur D. Little and Company, testified that a cost-effectiveness analysis could be performed, and the Environmental Protection Agency had done a preliminary extrapolation (App. 19a and n.23).

Nor will the decision below necessarily interfere with other pending OSHA matters. OSHA now has before it a large proceeding dealing with the identification, classification and regulation of carcinogens. One of the issues in that proceeding is the matter of comparative risk assessment. And OSHA is a member of the Interagency Regulatory Liaison Group, one of whose purposes

is to consider methods of assessing the risks involved in exposure to toxic substances and of estimating the relative benefits of those substances. In short, OSHA and other agencies are already considering ways to perform exactly the type of estimating which the court below has required.[12]

D. Clarification of the Occupational Safety and Health Act Will Come from Other Courts of Appeal.

The Secretary contends that the decision below is important enough standing alone to warrant review. MCA respectfully disagrees. The interpretation placed upon the Act by the Fifth Circuit is the first to treat the definitional section and the criteria section as an interrelated whole. There are, however, pending before other courts of appeal petitions for review of three different OSHA standards. The cotton dust and lead standards are before the District of Columbia Circuit. And the inorganic arsenic standard is in the Ninth Circuit. Thus, those circuits that have not yet had the opportunity to consider the interpretation applied by the Fifth Circuit will be in a position to reach their own conclusions based on the individual records and issues before them. MCA submits that this Court should await further clarification of the law by the circuit courts of appeal, particularly since there is no compelling health need for action by this Court now.[13]

---

[12] The seemingly contradictory positions of OSHA should be noted. On the one hand, OSHA has stated that ". . . in setting an exposure limit . . . OSHA may not substitute cost benefit criteria for the legislatively determined directive of protecting all exposed employees against material impairment of health or bodily function." (App. 162a). On the other hand, it says that the Act "itself does not preclude all consideration of cost-benefit assessments in the process of setting health standards for toxic substances." (Secretary's Petition, n.10 at pp. 17-18).

[13] The petitions overstate the health considerations involved. Both the court below, and the District of Columbia Circuit (which briefly had the case on transfer), have found a stay of the Standard appropriate and petitioners have not sought to terminate the stay which is presently in effect. The assertion in the Secretary's petition (p. 14, n.9) that the Standard "governs the occupational exposure of some 629,000 workers to a known cause of cancer" needs to be put into perspective by pointing out that only 30,000 workers would be exposed above the 1 ppm level which the Standard would impose and they are protected by the 10 ppm level presently in effect. And if there is a need for going below the present 10 ppm level the Secretary, instead of seeking review here, should promptly develop the "rough but educated estimates of the extent of benefits expected from reducing the permissible exposure level from 10 ppm to 1 ppm" which the court below correctly held the statute requires.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari filed by IUD and the Secretary should be denied.

Respectfully submitted,

EDMUND B. FROST
BRUCE M. BARACKMAN
1825 Connecticut Avenue, N.W.
Washington, D.C. 20009

Counsel for Respondent
Manufacturing Chemists Association